

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NW
WASHINGTON, DC 20001-8002**

Date: 10/03/96

Case No. 95-INA-39

In the Matter of:

Expert Auto Body Center
Employer,

on behalf of

Hamid Mehvari
Alien.

Before: Guill, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

Statement of the Case

On January 3, 1994, Expert Auto Body, Employer, filed an application for alien employment certification to enable Hamid Mehvari, Alien, to fill the position of Auto Repairer. The duties of the job were described as follows:

The occupant of this position will be responsible for repairs damaged bodies and body parts of automotive vehicles, such (sic) as automobile, buses and light trucks

according to repair manuals, using handtools and power tools; examines damaged vehicles and removes upholstery, accessories, electrical (sic) and hydraulic window-and-seat operating equipments, and trim to gain access to vehicle body and fenders (sic). Position dolly block against surface of dented area and beats opposite surface to remove dents, using hammer. Fills depressions with solder or other plastic materials. Removes damaged fenders, panels, and grills, or other plastic materials. Removes damaged fenders, panels, and grills, using wrenches and cutting torch, and bolts or welds, replacement parts in position, using wrenches or welding equipment. Straightens bent frames, using hydraulic jack and putting device. Files, grinds and sands repaired surfaces, using power tools and handtool-. Refinishes (sic) repaired surface, using paint spray gun and sander. Aims headlights, aligns (sic) wheels and bleeds hydraulic brake system. May paint surfaces after performing body repairs and be designated (sic) as Auto Mechanic. May repair or replace defective mechanic parts.

Employer required that applicants have three years of experience in the job offered and meet other special requirements "AS REQUIRED WITHIN THE INDUSTRY." (AF. 63)

The CO issued a Notice of Findings (NOF) proposing to deny certification on January 31, 1994. (AF. 58-61) The CO stated that Employer had failed to recruit U.S. workers in good faith and had rejected them for other than lawful job-related reasons. The CO stated that the special job requirement "AS REQUIRED WITHIN THE INDUSTRY" is vague, ambiguous and unacceptable and an unduly restrictive requirement which indicates that the job is not clearly open to any qualified U.S. worker and that recruitment is not being conducted in good faith. 20 CFR § 656.20(c)(8) and 656.21(b)(2). Employer was advised of the corrective actions required.

Employer, by counsel, submitted rebuttal on February 28, 1994. (AF. 42-57) Employer stated that applicant Arroyo admitted that he could not work the framework machine used in Employer's shop. Employer further stated that Mr. Arroyo does not have the required automotive work experience and that his experience is in home repair. Employer stated that he contacted Mr. Arroyo in good faith and interviewed him for the job. Employer stated that he received Mr. Arroyo's resume on September 4, 1993 and contacted him by phone to arrange a September 27, 1993 interview.

Employer stated that the job's special requirement had no effect on Mr. Arroyo or other applicants since no one will read it and it was not repeated in the job advertisements.

As to applicant Kovacs, Employer received his resume three to five days after it was mailed on November 18, 1993. Employer then placed numerous calls to the applicant and mailed a note to him asking him to call. After contact was made, the applicant stated that he had another job.

The CO issued a Final Determination denying certification on April 25, 1994. (AF. 36-41) The CO stated that Mr. Arroyo is a qualified body repairman who meets the stated job requirements; that his rejection for failure to meet the unstated job requirement of experience

operating a particular body frame machine constitutes the rejection of a U.S. worker for other than lawful job-related reasons and indicates that Employer did not recruit U.S. workers in good faith and that the job is not clearly open to any qualified U.S. worker. The CO also stated that the vague special requirement in item 15 of the application indicates both a lack of good faith recruiting and that the job is not clearly open to any qualified U.S. worker.

The CO further stated that there is no documentation that Employer contacted Mr. Arroyo as soon as possible after receipt of his resume and that interviewing him 17 days after referral is a violation of the regulations.

The CO further stated that applicant Kovacs was referred to Employer on November 18, 1993, but not contacted until December 14, 1993. The CO stated that no attempt to contact the applicant by mail has been shown. The CO determined that attempts to contact Mr. Arroyo and Mr. Kovacs were untimely and demonstrated a lack of good faith recruitment. The CO also stated that Employer's unavailability to engage in timely recruitment of U.S. workers is not an acceptable reason for making untimely applicant contacts.

Employer, by counsel, requested administrative judicial review on May 31, 1994. (AF. 1-15)

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 CFR § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U. S. worker. 20 CFR § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. H.C. LaMarche Ent., Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 CFR § 656.1.

Contrary to Employer's assertion that applicant Arroyo's prior work experience has been in home repairs, Mr. Arroyo's resume states that he is an auto body and fender repairman with at least 18 years of experience, including work with frame machines and other auto body tools. (AF. 82) Mr. Arroyo clearly is a qualified applicant who meets all of the stated job requirements. His rejection for lack of knowledge in the operation of Employer's particular frame machine, an unspecified job requirement, constituted the rejection of a qualified U.S. worker for other than lawful job-related reasons. 20 CFR § 656.21(b)(6); Jeffery Sandler, M.D., 89-INA-316 (Feb. 11, 1991) (en banc); Photo Network, 89-INA-168 (Feb. 7, 1990). In view of this determination, certification was properly denied and other issues need not be discussed.

ORDER

The denial of labor certification is AFFIRMED.

Entered at the Direction of the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.